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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MICHAEL N. SHERIDAN and
MARY A. SHERIDAN,
Petitioners,
v.
THE UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the intentional tort exception of the Federal Tort Claims Act bars all suits against the United States alleging negligent failure to prevent a federal employee from committing an intentional tort, including cases in which the injury results from the government's breach of an affirmative duty to protect the public and those where the source of the government's duty to prevent the injury arises independent of its status as the assailant's employer.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A at 1a-19a) is reported at 823 F.2d 820. The opinion of the district court (Pet. App. B at 20a-29a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1987. *See* Pet. App. A at 1a. The petition for a writ of certiorari was filed October 16, 1987 and granted by this Court on January 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, § 1346(b) provides, in pertinent part:

> Subject to the provisions of [28 U.S.C. §§ 2671-2680], the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Title 28, United States Code, § 2680 provides, in pertinent part:

> The provisions of this chapter and section 1346(b) shall not apply to—
>
> • • • •
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence or to make arrests for violations of Federal law.

STATEMENT

This case arises out of Dr. and Mrs. Sheridan's attempt to recover for the injuries they sustained when, because of the government's negligence, they were fired upon by a Navy enlisted man outside the Naval Medical Center in Bethesda, Maryland. The undisputed facts[1] are as follows:

In February, 1982, Robert W. Carr was a Medical Aide enlisted in the United States Navy and stationed at the Navy Medical Center in Bethesda, Maryland (commonly known as "Bethesda Naval"). He resided in base quarters where he shared a room with another enlisted man. In defiance of Navy regulations which prohibited the possession and storage of firearms in base housing, Mr. Carr maintained a .22 caliber rifle and ammunition in his quarters. Navy regulations not only proscribed such conduct, but as well placed an affirmative obligation on any individual who knew of a violation of such regulations to bring this matter to the attention of the appropriate authorities. Mr. Carr's roommate, also a Navy enlisted man, was aware of Mr. Carr's possession of this contraband, but he remained silent about the weapon and ammunition until the Navy made its investigation into the shooting.

After his assigned shift on February 6, 1982, Mr. Carr began drinking and ultimately became inebriated. At some point in the evening, Mr. Carr packed some of his possessions, including the rifle and ammunition, into a bag and left his quarters. Between 8:45 and 9:00 that

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[1] This case arises on appeal of the granting of the government's motion to dismiss; therefore all facts as pleaded by the Sheridans must be accepted as true. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). In addition to the allegations in the complaint, the Sheridans relied on facts learned in discovery in opposing the government's motion to dismiss their complaint. *See* J.A. 10-12. The district court, and the court of appeals, accepted these additional allegations as true for purposes of their decisions.

evening, three Navy personnel found Mr. Carr lying face down on the concrete floor in a part of the campus known as the "old hospital building." Recognizing that Mr. Carr was inebriated to the point of unconsciousness, they began to escort him to the base emergency room.

Two of the corpsmen carried Mr. Carr while the third carried the bag containing the rifle and ammunition. Mr. Carr was unable to support himself and the corpsmen had a difficult time transporting him to the emergency room. Several times along the way Mr. Carr slipped from their grasp and fell to the floor and, at least on one occasion, Mr. Carr fell head first down a flight of concrete stairs.

Notwithstanding his debilitated condition, Mr. Carr broke free from the two corpsmen supporting him and snatched his bag back from the third. When he grabbed his bag, he revealed the barrel of his rifle. Yet when this happened, none of the corpsmen attempted to restrain or subdue Mr. Carr, forcibly or otherwise. Nor did they attempt to alert base security. Rather they simply fled, apparently without another thought, leaving Mr. Carr to his own devices.[2]

Mr. Carr made his way out of the hospital building and ended up near the public road that fronts the campus of Bethesda Naval. At that point, Mr. Carr began shooting at passing vehicles, including a public transit bus and the vehicle driven by the Sheridans. Mrs. Sheridan was struck both by the bullets and shards of the shattered windshield and she sustained injuries to her face and hands. Dr. Sheridan was not physically injured, but he was traumatized by both the shooting itself and by witnessing his wife's injuries.

After exhausting their administrative remedies, the Sheridans brought suit in the United States District Court

[2] In its brief in response to the Sheridans' petition, the government contends that one of the corpsmen did notify base security about Mr. Carr. *See* Brief for the United States at 2 n.2. Resolution of this factual dispute, of course, is for the district court.

for the District of Maryland. In that court, the government moved to dismiss on the basis of the "intentional tort" exception, 28 U.S.C. § 2680(h). The district court, while "sympathetic" to the Sheridans' plight, Pet. App. B at 26a, granted the government's motion. Over Chief Judge Winter's dissent, the Fourth Circuit affirmed. This petition timely followed.

SUMMARY OF ARGUMENT

Dr. and Mrs. Sheridan filed suit against the United States pursuant to the Federal Tort Claims Act (hereafter "FTCA" or "the Act") to obtain compensation for the injuries they sustained as a result of the government's negligence. Relying on *United States* v. *Shearer*, 473 U.S. 52 (1985), both the district court and the court of appeals below held that their claims were barred by the intentional tort exception to the Act, 28 U.S.C. § 2680(h), as they "ar[ose] out of assault [and] battery." The courts below, and many of the lower courts that have recently addressed the intentional tort exception, have reduced *Shearer*[3] to the simplistic rule that a case "arises out of assault and battery" whenever the government's negligence allows a federal employee to commit an intentional tort. This case shows that the rigid interpretation adopted in *Shearer* incorrectly gauges Congress' intent and thus imprudently absolves the government of responsibility for its negligence. Accordingly, the decision below must be reversed and the Sheridans allowed to press their claims for recovery for the injuries they sustained as a result of the government's negligence.

1. There is no dispute here that the government was negligent, and that the government's negligence was a proximate cause of the Sheridans' injury. Nor is there any dispute that the Sheridans were assaulted and battered by a federal employee; indeed this was one of the

[3] We use "*Shearer*" generally to refer to Part IIA of Chief Justice Burger's opinion on which the Court was evenly divided.

foreseeable consequences of the government's negligence. There are several reasons, however, why the Sheridans' claims do not "aris[e] out of assault [or] battery" and why, therefore, the courts below erroneously dismissed their claims.

First, the Sheridans were injured because the government breached a duty it had imposed upon itself to protect members of the public, including the Sheridans. Both the Department of the Navy and the Navy Medical Center had adopted regulations prohibiting the storage of weapons on base and requiring known violations of these regulations to be reported to appropriate authorities. *See* J.A. 8 at n.1. While the FTCA certainly did not impose upon the government the obligation to adopt these regulations, once the government assumed this duty it was obligated to carry it out with due care. Every court that has considered this precise question, with the exception of the court below, has held the intentional tort exception inapplicable, and thus required the government to answer for breaching its affirmative obligation to prevent the commission of an intentional tort. The Fourth Circuit's treatment of this issue is illogical and irreconcilable with Congress' remedial purpose in enacting the FTCA. At a minimum, § 2680(h) must allow actions that seek to hold the government to its self-imposed duty to protect specific members of the public.

2. No court has questioned the amenability of the government to suit when it negligently allows a nonfederal employee to commit an intentional tort. Justice Harlan's analysis in *Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954), has been universally accepted; indeed even *Shearer* cited the *Panella* line of authority with approval.

The government conceded below, and the court of appeals held, that the Sheridans' claims would lie had their assailant been other than a federal employee. Yet the government's duty to protect the Sheridans from injury

arose wholly independent of Mr. Carr's employment status. Had it been a patient rather than a corpsman who removed and later fired the illegally stored weapon, or had it been a private citizen rather than a federal employee whom the three corpsmen found brandishing a firearm in the old hospital building, the government's liability would have gone unquestioned. Congress did not intend that the applicability of the intentional tort exception would turn on the happenstance of the employment status of the individual the government negligently allowed to commit an intentional tort: an injury caused by an intentional tort of a federal employee no more "arises out of assault [and] battery" than does one caused by the intentional tort of a nonfederal employee. Accordingly, the intentional tort exception cannot apply when the employment status of the assailant is immaterial to both the government's duty and the actual commission of the intentional tort.

3. The suggestion in *Shearer*, and the holdings of certain lower courts, that claims of "negligent supervision" [4]

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[4] "Negligent supervision" has been used to describe a broad array of claims, ranging from negligence in hiring and retention to actual supervision on the job. We will use "negligent supervision" in the same manner as did *Shearer; i.e.*, to refer to claims of the breach of such duties to prevent intentional torts as might arise solely out of the fact of government employment.

We submit that an analysis that focuses on "negligent supervision" leads away from Congress' purposes in enacting the intentional tort exception. It may be, as the government argued in *Shearer*, that "an employer has no general duty to exercise reasonable care to prevent an employee from injuring others while acting outside the scope of his employment and off the employer's premises." Brief for the United States at 11, *United States* v. *Shearer*, 473 U.S. 52 (1985). But if this is so, then such claims are properly rejected because there is no duty, not because of § 2680(h). The key to applicaiton of the intentional tort exception to a negligence claim is attention to the elementary components of negligence: duty, breach, causation and injury. Focus upon particular classes of claims is unenlightening and potentially misleading.

can never lie against the government is inconsistent both with the broad remedial purposes of the FTCA and its specific directive that the "United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Congress intended that a federal day care center be held to the same standard as a private one; that a government truck driver be held to same standard as a teamster. The purpose of the intentional tort exception was to protect the public fisc in cases where the government has no control over a federal employee's commission of an intentional tort, *i.e.*, where without notice or warning a federal employee engages in aberrant behavior that causes injury to a third party. It was not to absolve the government for the consequences of its negligence in allowing its agents to commit intentional torts when it did have both the opportunity and duty to prevent the injury.

Section 2680(h) speaks in terms of claims "arising" out of intentional torts, not claims resulting from or involving them. The proper focus must be on the genesis of the injury, not its most immediate cause. If the injury had its genesis in the government's negligence, then the government, just as a private individual, must be held to answer. Contrary to the suggestion in *Shearer*, this is not a matter of artful pleading, but instead one of proof. Whereas a private employer might be held to answer for the intentional torts of its employees solely by virtue of its status as employer, the United States plainly may not. But where an individual can show that the government was negligent in allowing one of its agents to commit an intentional tort, the government must be held to answer.

ARGUMENT

A. The Statutory Language, Legislative History and Congressional Purpose of the Intentional Tort Exception

The issue presented here is strictly one of statutory construction: to what extent did Congress intend that the government would be answerable for its negligence in failing to prevent federal employees from committing foreseeable intentional torts. Specifically, this case focuses on Congress' intent in preserving sovereign immunity for claims "arising out of assault [and] battery." This statutory directive has proved susceptible to differing interpretations, and courts have found that the legislative history of the applicable provisions provides little insight into this particular question of governmental negligence. However, the more natural reading of the statute is that the government is liable when intentional torts arise out of its negligence, and this reading is reinforced by the most direct legislative history available.

Moreover, the clear purpose of the Act was to hold the government responsible for its torts just as if it were a private person, and none of the rationales for the exceptions provides a compelling reason to thwart this broad remedial purpose. In light of this purpose, the available indicia of legislative intent show that Congress did not intend to create a blanket exclusion for all actions involving intentional torts committed by federal employees. Rather, Congress' intent was to waive sovereign immunity for governmental negligence, while maintaining that immunity for intentional tort claims based on *respondeat superior, simpliciter*.

1. Statutory construction begins with the plain language of the statute itself. Here, there are two relevant statutory provisions. Title 28, United States Code, § 1346 (b) provides that

> The district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United

> States . . . for injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Title 28, United States Code, § 2680, provides, in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> > (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. . . .

While the language of § 1346(b) is plain and unambiguous, the phrase "arising out of" is susceptible to at least two different constructions. The government argues, and *Shearer* concluded, that by employing this "sweeping" language, Congress meant to bar "not merely claims *for* assault and battery," but instead claims that "sound in negligence but stem from a battery committed by a Government employee." 473 U.S. at 55.

While this is a possible reading of the statute, it can just as easily (and, we submit, more naturally) be read to exclude claims *the genesis of which* is assault or battery. Had Congress intended the *Shearer* result, it presumably would have used language such as "claims *involving* assault or battery," or even "any damage from assault and battery." *Cf. United States* v. *James*, 106 S.Ct. 3116, 3121 (1986). *Shearer's* characterization of the "arising out of" language as "sweeping" is gratuitous: nothing in the statute indicates that Congress meant this language to be expansive, rather than restrictive. The much-trumpeted distinction between "arising out of" and "for" assault and battery (*see Collins* v. *United States*,

259 F. Supp. 363, 364 (E.D. Pa. 1966); *Shearer*, 473 U.S. at 55) is of itself no more illuminating than the distinction between "arising out of" and "involving." It is no more compelling to say that Congress meant "arising out of" to be construed broadly because it did not say "for" than it is to say that it should be construed narrowly because it did not say "involving."

Focus properly should be on the words Congress used, not those it did not use. A fundamental axiom of statutory construction is that a statute must be construed using the literal or usual meaning of the language employed unless to do so would work absurd results or thwart the obvious purpose of the act. *In Re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978). Congress chose to use the word "arising," and as it is assumed that the legislative purpose is expressed by the ordinary meaning of the words used,[5] *United States* v. *Locke*, 471 U.S. 84, 95 (1985), presumably Congress intended to hinge the government's amenability to suit on whether the claim originated in governmental negligence. "Arising out of" cannot connote the "immediate cause" of the injury. *Shearer*, 473 U.S. at 55. Hewing to the ordinary language employed by Congress, the intentional tort exception cannot properly be read to foreclose all suits in which an intentional tort foreseeably resulted from governmental negligence.

2. The congressional intent behind the passage of the FTCA is plainly revealed by the legislative history. Congress had begun the process of limiting sovereign immunity in 1855, when it consented to suit in contract actions, and continued on that course by waiving immunity in patent infringement claims in 1910 and admiralty and maritime claims in 1920 and 1925. *See Rules to Provide*

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[5] To "arise" is defined as to "spring up, originate, to come into being or notice." Black's Law Dictionary 99 (5th ed. 1979). *See also* Webster's Third New International Dictionary 117 (1961) (defining arise as "to originate from a specified source").

for the Adjustment of Certain Tort Claims Against the United States: Hearings on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary, 77th Cong., 2d Sess. 38 (1942). From 1919 until the passage of the FTCA in 1946, virtually every Congress considered some form of federal tort reform. *See* H.R. Rep. No. 1287, 79th Cong., 1st Sess. 2 (1945). Indeed, in 1931 Congress passed, but had vetoed, a bill substantially identical to the one enacted in 1946. *See* S. 211, 72d Cong., 1st Sess.; 75 Cong. Rec. 191 (1931). No justification for continued sovereign immunity for tort claims could be identified, and the reliance on private relief bills had proved inadequate. *See* S. Rep. No. 1400, 79th Cong., 2d Sess. 7 (1946); S. Rep. No. 1011, 79th Cong., 2d Sess. 25 (1946). As the Committee stated in its explanatory remarks on H.R. 5373 (*Rules to Provide for the Adjustment of Certain Tort Claims, supra*, at 37-57):

> The survival of Government irresponsibility in the field of common-law torts is an anachronism, founded upon no sounder reason than historical prejudice against tort claims. No acceptable justification has ever been cited for this immunity.

Id., at 42. Thus, Congress' purpose in enacting the FTCA was to waive this archaic immunity and establish a uniform means for allowing those injured by government negligence to seek redress. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68-69 (1955).

The legislative history of the FTCA as a whole is as abundant as the history of the intentional tort exception is sparse. While intentional tort exceptions began to appear in proposed legislation as early as 1931, *see* S. 211, *supra*, § 206(13), 75 Cong. Rec. at 191, no discussion of these exceptions appeared until 1940. *See* H.R. Rep. No. 2428, 76th Cong., 2d Sess. 1-2 (1940) (limiting the right to sue in "certain classes" of torts). The legislative history most frequently focused upon, however, is the colloquy between Assistant Attorney General Francis M. Shea and members of the House Judiciary Committee:

> Mr. Robsion: On that point of deliberate assault that is where some agent of the government gets in a fight with some fellow . . . [a]nd socks him?
>
> Mr. Shea: That is right.
>
> Mr. Cravens: Assuming a C[ivilian] C[onservation] C[orps] automobile runs into a man and damages him . . ., is not that considered an assault and is not the action based on assault and battery?
>
> Mr. Shea: I should think not. I would think under the common law rather that would be trespass on the case.
>
> * * * *
>
> Mr. Cravens: This refers to a deliberate assault?
>
> Mr. Shea: That is right.
>
> Mr. Cravens: If he hits someone deliberately?
>
> Mr. Shea: That is right.
>
> Mr. Cravens: Is it not intended to exclude negligent assaults?
>
> Mr. Shea: No. An injury caused by negligence could be considered under the bill.

Rules to Provide for the Adjustment of Certain Tort Claims, supra, at 33-34. As this dialogue demonstrates, Congress did not give extensive consideration to the intricacies of tort law in adopting the assault and battery exception. To the extent any intent relevant to the present inquiry can be gleaned from this legislative history, however, it is that Congress did not intend to absolve the United States of liability for "negligent assaults," or injuries "caused by [its] negligence."

In addition to the recorded legislative history, two other sources shed light on Congress' intent in passage of the intentional tort exception. First, as *Shearer* recognized, Congress did not intend the intentional tort exception to bar *all* claims involving assault and battery: claims of governmental negligence allowing an intentional tort to be committed by nonfederal agents were

not to be precluded. 473 U.S. at 56-57. *Shearer* reconciled itself with *Panella* and its progeny, by focusing on Congress' purported intent to absolve itself of all liability for the intentional torts of its employees. While we question the soundness of this analysis, we know at least that claims of governmental negligence in failing to prevent the commission of an intentional tort by a nonfederal agent indisputably do not "arise out of" assault or battery within the meaning of § 2680(h).

Second, Congress revisited the intentional tort exception in 1973 and 1974 when it amended § 2680(h) to allow for recovery for claims "arising . . . out of assault [or] battery" of federal law enforcement officers. *See* Pub. L. No. 93-253, § 2, 88 Stat. 50 (1974). The impetus behind the amendment was a series of raids by federal agents in Collinsville, Illinois. Congress determined that individuals similarly harassed should not be relegated solely to *Bivens* actions to seek compensation. *See* S. Rep. No. 588, 93d Cong., 2d Sess. 4 *reprinted in* [1974] U.S. Code Cong. & Ad. News, 2789, 2790-91.

The 1974 amendment to § 2680(h) makes clear that Congress understood "arising out of" to refer only to *respondeat* claims for the enumerated torts. In language that tracks the original statute, Congress waived sovereign immunity for "any claim arising . . . out of assault [or] battery" committed by federal investigative and law enforcement officers. Congress stated that this provision "make[s] the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* [v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)] (and for which that case imposes liability upon the individual Government officials involved)." S. Rep. No. 588, *supra*, at 4. *Bivens* involved only the intentional conduct of federal agents.

As this Court recognized in *Carlson* v. *Green*, 446 U.S. 14, 20 (1980), § 2680(h) as amended "contemplates that

victims of . . . intentional wrongdoing shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officers alleged to have infringed their constitutional rights." This is the paradigm of a *respondeat* claim. Congress did not intend to do more than modify its 1946 exemption for *respondeat* claims. It certainly did not intend generally to expand or limit negligence claims of any sort.

Shearer cites the legislative history of this amendment for the proposition that "Congress did not hint that it thought the Government's liability for an assault and battery turned on the adequacy of supervision or warnings." 473 U.S. at 56. While this is true, it is too thin a reed to support *Shearer's* conclusion. Congress did not enumerate all possible claims under the FTCA because it intended state tort law to determine the available causes of action, and state tort law distinguished between *respondeat* and negligent supervision.

More important than what Congress did not do, of course, is what it did. And what it did was to waive sovereign immunity in the very language it used to create the intentional tort exception; *i.e.*, Congress made the government answerable for claims "arising . . . out of assault [or] battery" committed by law enforcement personnel. There is no dispute that Congress' expressed intent in enacting the amendment, as evinced by its plain language and ample legislative history, was to create *respondeat superior* liability for this class of intentional torts. Yet if Congress' 1974 use of the phrase "arising out of assault [or] battery" effected a waiver of sovereign immunity for *respondeat superior* claims, then its use of the identical language in 1946 must have been similarly limited to *respondeat* claims. Thus, contrary to *Shearer's* observation, the 1974 amendment fortifies the contention that the original Act spoke only to preserving immunity for *respondeat superior* claims of intentional torts. Congress did not hint (either

in the original enactment or in its amendment) that the government's liability should turn on the fortuity of the employment status of the assailant, or that liability should be determined without analysis of the nature of the government's duty to the victim. Yet this is precisely what courts applying *Shearer* have held.

3. Neither the statutory language nor the legislative history deals specifically with the issue of whether Congress intended to absolve the government of its responsibility for negligence in failing to prevent the commission of an intentional tort. None of the reasons underlying the adoption of the exceptions of § 2680, however, would justify the *Shearer* result. Moreover, it was firmly established when Congress began to consider draft proposals of a Tort Claims Act that state tort law differentiated between *respondeat superior* claims and claims of negligent supervision. Thus, placed in its historical perspective, and considered along with the announced policies underlying the exceptions, the intentional tort exception cannot be construed broadly to exclude all claims involving intentional torts committed by federal employees.

a. There are three policies generally seen as underlying the exceptions of § 2680:

> ensuring that "certain governmental activities" not be disrupted by the threat of damages suits; avoiding exposure of the United States to liability for excessive or fraudulent claims; and not extending coverage of the Act to suits for which adequate remedies were already available.

Kosak v. *United States*, 465 U.S. 848, 858 (1984). Of these three policies, only the second has any bearing on the intentional tort exception. The first rationale speaks to governmental activities that should be conducted free of the threat of damages suits, *i.e.*, those activities that involve the exercise of governmental discretion. *See* 28 U.S.C. § 2680(a), (b) and (c). The third rationale, the

existence of alternative avenues of relief, 28 U.S.C. § 2680(d), could not apply to the intentional tort exception, as indeed the lack of any remedy at law, and the consequent deluge of private relief bills, was one of the primary motivations behind the Act. *See Indian Towing Co.*, 360 U.S. at 69. Thus, only the second of these policies arguably applies to the intentional tort exception.

While it is unclear as a general matter how intentional tort claims are more susceptible to exaggeration and fraud than any other claim, however that may be, claims of negligently allowing an intentional tort to be committed are no different from any other claim of negligence. In any claim of negligence, the plaintiff would need to establish the existence of a duty.[6] There is no possibility of exaggeration or fraud in establishing this duty—indeed it is purely a question of law. Thus the sole policy underlying the intentional tort exception does not support differentiation between negligence claims in general and claims of negligent failure to prevent the commission of an intentional tort.

b. Moreover, at the time of Congress' consideration of the FTCA, the common law recognized two distinct claims against employers for the intentional injuries inflicted by their employees. *See* Harper and Kime, *Duty to Control the Conduct of Another*, 43 Yale L.J. 886, 896 (1934) (employer's ability to control employee's conduct imposes duty to control, even in situations where the employer could not be held liable under *respondeat superior* doc-

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[6] Thus, for example, in an automobile negligence case, the plaintiff would have to prove that the government owed him a duty, that it failed to exercise that duty with due care, and that this failure proximately caused his injury. In a case of negligent failure to prevent the commission of an intentional tort, the only proof that would differ significantly would be in the establishment of a duty; *i.e.*, instead of proving that the government had, for example, a duty not to drive at an excessive speed, the plaintiff would have to prove that the government had a duty not to allow firearms to come into the hands of inebriated individuals.

trine); Laski, *The Basis of Vicarious Liability*, 26 Yale L.J. 105, 105-06 (1916) (distinguishing liability based on employer's direct involvement from that based on *respondeat superior*). *See also* F. Harper, *A Treatise on the Law of Torts*, §§ 75, 291 at 174, 638-40 (1933) (describing two separate causes of action). Harper clearly explained that a negligence claim was not precluded when the supervised individual committed an intentional tort:

> [W]here the anticipation of negligent, intentionally wrongful or innocently dangerous conduct on the part of some third person is the very hazard which makes a defendant's conduct negligent, such activity by the third person will not operate as a superseding cause to relieve the defendant from liability therefor. Any other rule would, quite obviously completely frustrate the principle of negligence requiring one to abstain from conduct which creates an unreasonable hazard to others by creating an opportunity or temptation for the dangerous conduct of third persons.

Harper, *A Treatise on the Law of Torts*, § 75 at 174. In stronger language, Harper subsequently stated:

> [I]t is clearly unsound to afford immunity to a negligent defendant because the intervening force, the very anticipation of which made his conduct negligent, has brought about the expected harm.

Harper, *supra*, 43 Yale L.J. at 898. Negligent supervision thus was based on the employer's own conduct, and a claim would lie equally whether the supervised individual inflicted the injury negligently or willfully. *E.g.*, Harper, *A Treatise on the Law of Torts*, § 75 at 174. *Accord*, Fleming, *Vicarious Liability*, 28 Tul. L. Rev. 161, 188 (1954).

At the same time, the traditional doctrine of *respondeat superior* had been expanded to hold employers liable without fault for their employees' intentional torts committed

within the scope of their employment. *E.g.*, Note, *The Growth of Vicarious Liability for Wilful Torts Beyond the Scope of the Employment*, 45 Harv. L. Rev. 342 (1932). This doctrine was recognized as simply a means by which liability for a valid tort claim against a frequently judgment-proof employee could be shifted to the employer, giving the victim two tort claims for the same conduct: a tort claim directly against the tortfeasor/employee, and a *respondeat* claim against the employer. *See* Fleming, *supra*, 28 Tul. L. Rev. at 168.

Contemporary commentators expressed concern that the expanding definition of "scope of employment" was not anchored in concepts of the employer's control over his employees, but that it actually reflected a social policy decision to place the loss "on the one who can best afford to bear it." Note, *The Growth of Vicarious Liability*, *supra*, 45 Harv. L. Rev. at 349 n.53. *See also* Laski, *supra*, 26 Yale L.J. at 116-21. There was real concern that the lack of factual or doctrinal basis for expansion of the "scope of employment" presented "limitless possibilities" for the reach of *respondeat* liability. Note, *The Growth of Vicarious Liability*, *supra*, 45 Harv. L. Rev. at 348. Congress no doubt shared this concern that expansive "employment scope" definitions would make the public fisc vulnerable to innumerable claims nationwide, based on conduct over which the government could have had no reasonable control.

Whatever weaknesses were perceived in the existing *respondeat* trends, the important issue for our analysis is that at the time the FTCA was passed, both negligent supervision and *respondeat superior* were established common-law tort claims, and each provided a separate basis of liability. No concerns were expressed by either Congress or commentators that straight negligence claims, based on an identified duty to supervise or otherwise control an employee's conduct, would result in excessive government liability.

Legislating within this framework, Congress reserved sovereign immunity for certain classes of torts, among them "claims arising out of assault [or] battery." 28 U.S.C. § 2680(h). Claims based on supervision, hiring or control of employees are not mentioned in § 2680(h). Rather, § 2680(h) lists a number of intentional torts that were commonly used to support a *respondeat superior* claim. There is no indication in the language of the statute, or in the legislative history, that Congress considered this provision to reach all negligence claims involving intentional torts. Indeed, given this historical perspective, it appears that Congress wanted solely to forestall the encroachment of *respondeat superior* liability, at least until "considerable experience ha[d] been had under the proposed legislation." *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 13 (1940).

B. The Intentional Tort Exception Is Inapplicable Where the Government Has Breached a Duty Either Voluntarily Assumed or Imposed Upon It by Statute or Regulation

While there have been several cases which, in the wake of *Shearer*, have held that the government is not amenable to suit for claims of "negligent supervision," the court below is the only one to hold that the government is not responsible for the damages caused by its breach of a voluntarily assumed duty. In *Kearney* v. *United States*, 815 F.2d 535, 538 (9th Cir. 1987), the court held the government answerable for its negligence, including the violation of its regulations, in allowing an imprisoned military enlistee to escape and commit murder. Similarly, in *Lorrits* v. *United States*, 489 F. Supp. 1030 (D. Mass. 1980) and *DeLong* v. *United States*, 600 F. Supp. 331 (D. Alaska 1984), the government was held responsible for the intentional torts of its employees because in both cases it had voluntarily assumed a duty to protect the victims. In *Doe* v. *Scott*, 652 F. Supp. 549

(S.D.N.Y. 1987), *appeal pending*, No. 87-6061 (2d Cir. argued Oct. 2, 1987), the court held the government liable for allowing infants it supervised in a day care center to be molested. Most recently, in *Doe* v. *United States*, Nos. 87-1436 and 87-1437 (7th Cir. Jan. 21, 1988), the Seventh Circuit held the government liable for its failure adequately to safeguard children at a day care center and thus to allow an unidentified person to molest them.

Like these suits, the Sheridans claim that when the government promulgated regulations concerning weapon storage and safety, it voluntarily assumed a duty to protect them from injury.[7] As we argued below, *Shearer* did not purport to address situations in which the government's duty to the victim arose independent of its status as the assailant's employer. Thus, while we take issue with *Shearer's* analysis as a whole, it is particularly inapt in this context.

1. At the time of the FTCA's consideration and passage, it had been firmly established throughout the country that one who voluntarily undertook a duty was obligated to perform that duty with reasonable diligence. *See* Restatement of Torts § 323. By subjecting the United States to liability for its "negligent or wrongful act[s] or omission[s]," 28 U.S.C. § 1346(b), Congress intended to encompass the entire range of conduct classified as tortious under state law. *Laird* v. *Nelms*, 406 U.S. 797, 801 (1972). Indeed, it is now axiomatic that

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[7] As Chief Judge Winter recognized in his dissent, "the passage of regulations concerning weapon storage and safety constitutes . . . a voluntary assumption of duty." *See* Pet. App. A at 14a. *See also Underwood* v. *United States*, 356 F.2d 92, 98-99 (5th Cir. 1966) ("the [weapons regulations] were intended to minimize accidents and prevent injury to persons: they were for the benefit of the public, including [the victim.]") Certainly a foreseeable consequence of the breach of the Navy Medical Center's weapons regulations was that someone on or near the base would be injured.

where the government has voluntarily assumed a duty, it is responsible for carrying out that duty with due care. *Block* v. *Neal*, 460 U.S. 289, 297 (1983); *Indian Towing Co.*, 350 U.S. at 69.

No distinction in common law exists between voluntary assumption of a duty to prevent the commission of intentional torts and the voluntary assumption of any other duty. Nor is there any language in the FTCA which would suggest that Congress sought to make such a distinction. Moreover, as we noted above, the legislative history is devoid of any suggestion that this was Congress' intent.

To be sure, the language "arising out of assault [or] battery" can be read broadly to encompass all claims involving intentional torts. But as *Shearer* recognized (by accepting the *Panella* line of authority), Congress did not intend to cut such a wide swath with this exception. It is unlikely that Congress would make such a radical departure from established tort law without providing even a hint, in the Act or its history, that this is what it sought to do. The paramount purpose of the Act was to waive an unjustifiable and archaic immunity, and the only countervailing consideration of § 2680(h) was to protect the government from excessive and fraudulent claims. A claim of failure to observe a voluntarily assumed duty to prevent an intentional tort is no more capable of exaggeration or inflation than any other claim involving the breach of a duty voluntarily assumed. Thus neither purpose reveals or supports an intent to exculpate the government for its failure to observe a voluntarily assumed duty. Reading the intentional tort exception to bar voluntarily assumed duty claims therefore lacks textual support and flouts the plain purposes for the enactment of the applicable provisions.

2. The analysis in *Shearer* is premised on the notion that Congress did not distinguish between claims of negligent supervision and *respondeat superior* claims. 473

U.S. at 55. But a claim of failure to perform a voluntarily assumed duty is wholly distinct from both negligent supervision and *respondeat* claims. These distinctions, particularly in the nature of the imposition and execution of the duty, demonstrate that Congress did not intend to place this particular class of claims within the bar of § 2680(h).

Specifically, those opinions that have held the government responsible for its affirmative obligations, independent of its status as the assailant's employer, have distinguished *Shearer* on the basis that in a "negligent supervision" claim,[8] the relationship between the government and the victim arises "only at the time of the assault and only because of the assault." *Doe* v. *United States*, slip op. at 7. *See also Doe* v. *Scott*, 652 F. Supp. at 551; *Thigpen* v. *United States*, 800 F.2d 393, 398 (4th Cir. 1986) (Murnaghan, J., concurring). In contrast, in all independent affirmative duty cases, there must be a special duty undertaken by the government (or imposed upon it by statute or regulation) upon which the public is entitled to rely.[9]

This position is the same as that taken by the government at lease twice before in this Court. Brief for the United States at 22 n.5, 24, *United States* v. *Shearer*, 473 U.S. 52 (1985); Brief for the United States at 4

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[8] As we stated above, the distinction between negligent supervision claims and other claims is generally unhelpful. See note 4, *supra*. We refer to this class of claims here, however, in contradistinction to claims in which the government's duty arises apart from the fact that it is the assailant's employer.

[9] The independent duty in this case arises out of the Navy's regulations concerning storage of firearms. In *Bennett* v. *United States*, 803 F.2d at 1502, 1503 (9th Cir. 1986) (although the court's analysis did not turn on this point), the government's duty to operate a school arose out of statute. Why the government has taken upon itself the responsibility to protect members of the public is not as important, of course, as the fact that once it has done so, it is obligated to execute that responsibility with due care.

n.7, *Johnson* v. *United States*, *cert. denied*, 107 S.Ct. 315 (1986). In particular, the government noted that an actionable duty to supervise, not barred by § 2680(h), would arise if "the intentional tortfeasor was, for example, a dangerous mental patient who also happened to be a government employee." Brief for the United States at 22 n.5, *Shearer*. The government emphasized that this duty must arise from the government's knowledge that "special hazards" are posed to third parties. *Id.* at 24. The government's arguments in this respect are consonant with ours, and correctly state the law.

When the government has undertaken such an affirmative obligation, as, for example, in operating a day care center, its duty to protect its wards from harm flows directly from that undertaking. As in *Doe* v. *United States*, the government breaches its duty not when the child is assaulted, but instead when it fails to exercise adequate supervision over the child, thus enabling the assault to occur. A negligence claim is only complete upon injury, of course, but in this situation, once the government breaches its duty to care for the child, injury could come in any number of ways. The child could be hit by a car, assaulted, injured as a consequence of nearby blasting, or even struck by lightning. Yet no matter how the child is injured, the government's duty is the same and its breach of that duty is the same. The claim of a child thus injured by assault no more arises out of an intentional tort than does the claim of a child injured in blasting arise out of inherently dangerous activity.[10]

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[10] Surely the government would concede that a child at a federally-operated day care center negligently allowed to wander into an area of, and subsequently injured by, government blasting, would have a viable claim under the FTCA. This is so not because there is no specific exclusion for inherently dangerous activities, but instead because there are two separate torts, related only in that the second catalyzed the incipient negligence into injury.

The government's duty to the Sheridans arose when it promulgated regulations concerning firearms. It breached that duty 1) when Mr. Carr brought the weapons onto the base; 2) when his roommate failed to report this to base security; and 3) when the three corpsmen found him with the rifle but failed to alert base security. The Sheridans could as easily have been injured by an accidental discharge of Mr. Carr's weapon as they were by his intentional firing. But in either case, the government's duty was the same and its breach of that duty the same.

The court below dismissed this argument without extended discussion. But inherent in the court's decision must have been that Congress intended, in using the "arising out of" language, to hinge liability on acts wholly unrelated to the government's duty and breach thereof. It is, of course, not lightly to be inferred that Congress intended such untenable distinctions, *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982), and thus, given the ambiguity of the statutory language and the absence of supporting legislative history, this construction of § 2680(h) must be rejected.

C. The Intentional Tort Exception Is Inapplicable Where the Assailant's Status as a Federal Employee Is Not Related to the Injury

We argued below that the intentional tort exception cannot bar claims involving intentional torts where the status of the assailant as a federal employee was only coincidental to the government's duty and breach and the ultimate injury. More specifically, we argued that the government's negligence in this case, allowing the storage of the weapons on base and failing to take adequate safeguards once an individual was found wandering the campus of Bethesda Naval brandishing a firearm, could as easily have been actuated into injury by a federal employee as by a private citizen. The Fourth Circuit's re-

jection of this argument imparts an utterly absurd intent to Congress and focuses liability on the particulars of the assailant's employment status rather than the government's duty and breach thereof. Such a distinction is wholly unknown to the common law that Congress intended to incorporate under the FTCA. Thus, the rigid employee/nonemployee dichotomy is untenable.

1. The Sheridans were fired upon by a federal employee. This fact, critical to the courts below, has absolutely no bearing on either the existence of the government's independent duty to the Sheridans or the government's breach of that duty. Congress could not have intended that the government's liability would turn on the fortuity that the assailant who actuated its negligence into injury happened to be on the federal payroll.

As Chief Judge Winter recognized in his dissent, the government's liability in this case would have been unquestioned "had it been a private citizen who took the weapons wrongfully stored in Mr. Carr's room, or had it been a private citizen who the three corpsmen found wandering drunk and brandishing a rifle." Pet. App. A at 12a. And, indeed, that it was a federal employee was purely fortuitous—it could as easily have been a patient, private citizen, or even a newly-discharged corpsman who removed the weapon and who was found brandishing it in the old hospital building. Had this one fact been different, then the government would have been liable. Yet its duty would have been the same, its breach of that duty the same, and the injury to the Sheridans the same.

Similarly, and perhaps more starkly, *Doe* v. *United States* demonstrates the illogic of focusing on the employment status of the assailant to determine the applicability of § 2680(h). In *Doe*, the identity of the assailant was unknown—it could have been a federal employee (either on duty or off), or a private citizen. Focusing on the employee/nonemployee distinction, the district court dismissed the complaint, holding that the plaintiffs'

claims were jurisdictionally barred unless they could establish that the assailant was not a federal employee. Here, again, the government's duty, its breach, and the injury were all unaffected by the assailant's employment status. The Seventh Circuit, properly, reversed.

Focusing solely on the employment status of the assailant thus leads to absurd results. As Justice Frankfurter held in an analogous context:

> we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance . . .

Indian Towing Co., 350 U.S. at 67. Congress did not intend the "arising out of" language to preclude all suits in which the government's negligence was to allow an intentional tort to be committed. *See Panella*, 216 F.2d at 624; *Shearer*, 473 U.S. at 56-57. Yet the Sheridans' claims, where the assailant happened to be a federal employee, and the Does' claims, where the identity of the assailant was unknown, no more "ar[ose] out of assault [or] battery" than did Panella's. Since statutes must be construed to avoid creating "untenable distinctions and unreasonable results," *American Tobacco Co.* v. *Patterson*, 456 U.S. at 71, and since we know that the intentional tort exception does not bar *all* suits involving assaults and batteries, it cannot be presumed that Congress intended to limit the intentional or exception to circumstances so utterly divorced from the policies underlying the adoption of the Act, and, indeed from common sense.

2. The court below acknowledged that its rigid employee/nonemployee rule necessarily required analysis of whether the assailant was on or off duty at the time he committed the assault. Pet. App. A at 4a n.1. *See also id.*, at 18a & n.10. To be sure, since an off-duty federal employee is indistinguishable from a nonemployee for purposes of the FTCA, and since Congress indisputably was concerned only with the conduct of its employees

acting within the scope of their employment, the within-the-scope employee/other person distinction is slightly more tenable than a strict employee/nonemployee rule.

Shearer, however, did not draw this distinction. Indeed, there was no contention that Private Shearer's assailant was on duty or acting within the scope of his employment when he committed the battery. *Shearer*, by focusing solely on where the assailant got his paychecks, drew a "bright line," but it drew it on the basis of a fact wholly unrelated to Congress' purposes in creating the Act and the intentional tort exception.

Moreover, the "bright line" supposedly drawn by *Shearer* is in reality quite fuzzy. According to *Shearer*, Congress intended to absolve the government of its negligence in allowing "its employees" to commit intentional torts. But there are myriad types of federal employees. *Shearer* is not instructive, for example, on how Congress intended to treat intentional torts committed by part-time employees, temporary employees, or seasonal employees. Nor is *Shearer* instructive on how to treat the intentional torts of employees on unpaid leave, reemployed annuitants (who draw their salary from the Civil Service Retirement Fund rather than agency appropriations), or retired military officers whose annuities are "reduced compensation for reduced current services." *McCarty* v. *McCarty*, 453 U.S. 210, 222 (1981). The permutations are endless and not resolvable on any principled basis by *Shearer's* putative "bright line."

Undoubtedly, the government can come up with some rationale for treating each of these classes of employees. But it is one thing for the government to conjure a paradigm for treating these varying employment situations; it is quite another to assume that this is what Congress intended:

> There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation.

Indian Towing Co., 350 U.S. at 68. It defies common sense to say that Congress, in considering the breadth and scope of § 2680(h), intended its application to hinge on such arcana.

Congress' focus exclusively was on the consequence of the acts of the government's employees acting within the scope of their employment. If there is any merit to determining the applicability of the intentional tort exception by reference to the assailant's employment status, and we submit there is at best little, then this distinction must turn on whether the assailant was acting within the scope of his employment. The contrary proposition attributes irrational and bizarre motives to Congress, flouts Congress' overriding consideration in enacting the FTCA and affronts common sense. It cannot be accepted.

D. The FTCA Does Not Exclude "Negligent Supervision" Claims as a Class

The decision in *Shearer* excludes "negligent supervision" claims as a class from the FTCA. It must be conceded that this exclusion is not required by the language of the statute. Moreover, as we have shown above, there is nothing in the legislative history that supports, let alone compels, it. What does emerge from the language and history of the FTCA is a congressional intent to incorporate into the body of federal tort law the common law principles of tort that have been developed in the various states.

Thus, the common law of tort—not the FTCA—determines the existence of the government's duty, the reasonableness of the government's conduct in discharging that duty, whether any breach proximately caused the claimant's injury, and hence, the viability of the negligence claim. This must be the basis for the "negligent supervision" claim addressed in *Shearer* and presented here.

Shearer tacitly acknowledged this analysis by endorsing *Panella*, yet concluded that when the "injury" component of the negligence claim identifies physical injuries inflicted by a government employee, the negligence claim "arises out of assault [or] battery" and is barred by § 2680(h). It is clear from the legislative history, however, that Congress understood that the FTCA would bar claims when intentional and not negligent conduct led to an assault. *Rules to Provide for the Adjustment of Certain Tort Claims*, *supra*, at 34. In providing an exemption from the waiver of sovereign immunity for claims arising out of "assault [and] battery," Congress did not exempt, as it could have, all claims that related in any way to deliberate attacks by government employees. Congress did not exempt assault and battery as a general activity. Indeed, the only generic activities that Congress exempted in such wholesale fashion were clearly governmental ones, and it did so for all claims, whether based on intentional or negligent conduct. *See* H.R. Rep. No. 1287, *supra*, at 6; S. Rep. No. 1400, *supra*, at 33. Section 2680(h), in distinction, was understood to reach individual plaintiffs' "tort claims," not any particular activity. *Id.*

The lower court's exemption for "negligent supervision" claims is not compelled by *Kosak*, 465 U.S. 848; *United States* v. *Neustadt*, 366 U.S. 696 (1961); or *Block*, 460 U.S. 289. *Block* held that the mere existence of a partial overlap between an exempt and a non-exempt claim does not bar the non-exempt claim. 460 U.S. at 298. This holding certainly does not stand for the general proposition adopted in *Shearer*.

Similarly, *Kosak* is not dispositive because it dealt with a provision of the FTCA that was designed to exempt an entire category of governmental activity—namely, detention of goods by customs officials. The construction of the exempting language there was premised on a clearly discernible congressional intent to exempt a

whole category of governmental activity. There is nothing comparable here.

Finally, *Neustadt*, 366 U.S. at 703-06, which held that the misrepresentation exemption of the FTCA includes both intentional and negligent misrepresentations, must be read in conjunction with *Block*. Again, *Block* holds that an overlap between an exempt and non-exempt claim does not defeat the viability of the non-exempt claim. 460 U.S. at 298. *Neustadt* had only a single claim. The situation here, if anything, is analogous to *Block* and, as indicated above, that holding thus does not compel the broad, across-the-board ruling made in *Shearer*.

At all events, the governmental conduct the Sheridans rely upon for their claim is garden-variety negligence. The viability of this negligence claim is determined by negligence law, not by whether Mr. Carr's conduct meets the elements of a tortious assault or battery under Maryland state law. If a complaint alleges no cognizable duty that arose or was breached, tort law will dispose of the claim. *Shearer*'s concern that this claim would be no more than a "semantical recasting of events" is unclear: as distinct from § 2680(c), for example, Congress' intent in creating the intentional tort exception was not to protect government activity from the threat of damage suits. A plaintiff can "recast" his complaint all he chooses, but if he cannot articulate a duty his complaint will be summarily dismissed.

Shearer ignores the imperatives of tort law, and the broader result *Shearer* produces is not supported by prior judicial interpretation of § 2680(h) or the intent of the Act. The sovereign immunity reserved for specific intentional torts, as the Ninth Circuit has held, "[does] not insulate the government from liability where its own negligence [is] the proximate cause of the injury." *Morrill* v. *United States*, 821 F.2d 1426, 1427 (9th Cir.

1987). The court of appeals below has held to the contrary, and its ruling must be reversed.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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